Supreme Court, U. S.
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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1978

No. 78-36

VIRGINIA W. LUCOM, Petitioner

v.

DAVID L. REID, ETC., et al., Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth District of Florida is reported at 349 So.2d 661.

JURISDICTION

Respondents respectfully submit that jurisdiction in this Court does not lie

pursuant to 28 USC 1257.

QUESTIONS PRESENTED

1. Whether the Petition for Writ of Certiorari is directed to an improper court and should be denied.

2. Whether the decision below passed on a substantial question or rested on adequate and independent state grounds.

3. Whether there was a reinterpretation of a state statute such that Petitioner was deprived of due process of law.

STATEMENT

Petitioner originally filed this action in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida on October 29, 1975, seeking to challenge and vacate the 1974 assessment of certain real property

taxes.

Prior to initiating suit in the Florida courts, Petitioner had filed a similar suit in the U.S. District Court (Southern District, Florida) under 42 USC 1985. Chief Judge Fulton dismissed such suit pursuant to 28 USC 1341 because the "case is essentially one to enjoin, suspend or restrain the assessment,levy, or collection of a state tax," and "Florida law provides a plain, speedy and efficient remedy which can be had in state courts." The District Court's opinion was affirmed by the Fifth Circuit Court of Appeals in an unreported decision and this Court has previously denied a petition for a writ of certiorari involving such decision. Lucom v. Reid, Case No. 77-89, Cert. Den.

After being dismissed from Federal District Court but prior to the 5th Circuit

Court of Appeals' affirmance, the Plaintiff filed suit in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. The Defendants-Respondents moved to dismiss Plaintiff's complaint for her failure to timely and properly invoke the Court's jurisdiction pursuant to F.S. 194.171, which governs challenges to ad valorem tax assessments. The trial court denied Respondent's motions to dismiss, from which an interlocutory appeal was taken to the Fourth District Court of Appeals. On August 2, 1977, the Fourth District reversed the trial court and remanded with directions to dismiss the complaint because the Petitioner had failed to comply with the statutory prerequisites found in F.S. 194.171(3) and (4) for the institution of an ad valorem tax assessment challenge. The Florida Supreme Court

thereafter denied a Petition for Writ of Certiorari on February 17, 1978, and denied a Petition for Rehearing on April 5, 1978.

I. THE PETITION FOR WRIT OF CERTIORARI IS DIRECTED TO AN IMPROPER COURT AND SHOULD BE DENIED.

The Petitioner alleges the jurisdiction of this Court lies in 28 USC 1257, which provides for review of "final judgments or decrees rendered by the highest court of a state in which a decision could be had." Where a state has intermediate appellate courts, as Florida does, and where review by the highest state court is discretionary (or a matter of right) such review must be sought in the highest state court prior to seeking review in this Court. Banks v. State of California, 395 US 708 (1969). Stratton v. Stratton, 239 US 55 (1915).

Where the highest state court declines to exercise the discretionary review, the judgment of the intermediate court becomes the judgment of "the highest court of the State" under 28 USC 1257. Western Union Telegraph Company v. Priester, 276 US 252 (1928); Hammerstein v. Superior Court of California, 341 U.S. 491 (1951); Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 US 157 (1954).

Since the Petitioner sought review of the decision of the Fourth District Court of Appeal in the Florida Supreme Court, which Court discretionarily declined to exercise its jurisdiction, this Petition for a Writ of Certiorari being directed to the Florida Supreme Court rather than the Fourth District Court of Appeals, is consequently not directed to

the proper court and is insufficient to invoke this Court's jurisdiction under 28 USC 1257.

II. THE DECISION BELOW DID NOT PASS ON A SUBSTANTIAL FEDERAL QUESTION AND RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

Irrespective of the fact that Petitioner has directed her Petition for Writ of Certiorari to the wrong court, the decision of the Fourth District Court of Appeals did not pass on a substantial federal question and rests on adequate and independent state grounds.

As stated in Durley v. Mayo, 351 US 277, 281 (1956):

> It is a well-established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to the determination of the cause. (e.s.)

Cf. Brinkerhoff-Faris Trust v. Hill, 281 US 673, 680 (1930).

It is equally well-settled that this Court will refuse to review a state court decision that rests on adequate and independent state grounds whether substantial or procedural. Henry v. Mississippi, 379 US 443 (1965). However, when procedural defaults in a state court prevent the proper presentation and review of ones' federal rights, such procedural rules must serve a legitimate state interest. Henry, supra at 447.

In the case sub judice, by failure to follow the statutory prerequisites of Section 194.171(3) and (4), F.S., Petitioner failed to properly invoke the jurisdiction of the state court to review her tax assessment. Millstream Corporation v. Dade County, 340 So.2d 1276 (Fla. 3 DCA 1977); Blake v. R.M.S. Holding Corporation,

341 So.2d 795 (Fla. 3d DCA 1977). Therefore, it was by virtue of the Petitioner's own negligence that she was precluded from getting state court review of her federal claims.

The prerequisites of Section 194.171(3) and (4), F.S., to the filing of an action to contest a tax assessment are that the taxpayer pay the amount of tax which he admits in good faith to be owing and that the receipt for such payment be filed with the complaint. That such a procedural rule serves a legitimate state interest can hardly be denied, and, indeed, the Petitioner makes no such allegation. It is indispensable to county and local government that property taxes be assessed and collected. The state legislature is therefore necessarily vested with the power to enact necessary laws to secure the prompt collection of such a tax.

Rudisell v. City of Tampa, 9 So.2d 310 (Fla. 1942). Taxes are assessed for each individual year commensurate with the adoption of the governmental budgets to be funded by such taxes. To permit the filing of suits to contest tax assessments, which potentially last for numerous years, without the timely and proper payment of that portion of the tax liability not in dispute, would improperly and unnecessarily deprive local government of such needed revenues and throw the entire budgetary process of county and local governments into total disarray. As stated in Millstream Corporation v. Dade County, 340 So.2d 1276, 1278 (Fla. 3d DCA 1977):

> There is little doubt that the state may validly impose such a requirement. Were it not so, it would be an easy matter to avoid paying legitimate taxes simply by challenging one facet

> of an otherwise valid assessment.

The state, therefore, has a legitimate interest in the protection of the governmental budgetary process and the reliance on §194.171(3) and (4), F.S., is directly related to that legitimate interest.

III. THERE WAS NO REINTERPRETATION OF A STATE STATUTE SUCH THAT PETITIONER WAS DEPRIVED OF DUE PROCESS OF LAW.

Petitioner relies on Brinkerdoff-Faris Trust v. Hill, 281 U.S. 673 (1930), for the proposition that it is a denial of due process of law for a state, acting through its judiciary, to reinterpret a statute at such a time so as to deny a person the opportunity to be heard and to present his case. Brinkerhoff, however, is easily distinguishable from the case sub judice. Brinkerhoff was denied relief from an alleged discriminatory tax assessment in a Missouri

trial court because he was guilty of laches in having not pursued his case before the county or state board of equalization pursuant to statutory law. The Supreme Court of Missouri held that such boards of equalization did not have the power to grant such relief, but the state tax commission did. The suit was then dismissed because Brinkerhoff was guilty of laches in not complaining to the state tax commission. The ruling of the Missouri Supreme Court, however, reversed a settled line of authority which held that the state tax commission did not have the power to review such claims. The taxpayer filed a petition for rehearing in the state supreme court alleging that the denial of relief based on the new interpretation violated the due process clause of the 14th Amendment.

The state supreme court denied the petition for rehearing. On review, this Court found that the decision of the Missouri Supreme Court, in effect, denied the taxpayer due process of law and reversed and remanded the case for further proceedings.

Unlike the taxpayer in Brinkerhoff, Petitioner has failed to assert in State Court that there was a reinterpretation of a state statute which has denied her due process of law. Rather, she has presented this claim for the first time in her Petition to this Court even though she had ample opportunity to raise such a claim in her petition for a writ of certiorari and petition for rehearing to the Florida Supreme Court. It is too late to present such a claim for the first time in a Petition for Writ of Certiorari to this Court where ample

opportunity existed in state court. Hiawassee River P. Co. v. Carolina-Tennessee P. Co., 252 U.S. 341 (1920).

In addition to improperly raising the Brinkerhoff due process argument, Petitioner's reliance on Brinkerhoff is unfounded in that there was no "midnight" reinterpretation of a state statute so as to produce a denial of due process of law. A clear interpretation of §196.01, F.S. (now incorporated in §194.171, F.S.), was given by the Florida Supreme Court in Adler-Built Industries, Inc. v. Metropolitan Dade County, 231 So.2d 197 (Fla. 1970), wherein it was stated at page 199:

> It is noteworthy that in the same amendatory act, Ch. 69-140, Acts of 1967, it amended §196.01 so as to require, as a jurisdictional prerequisite, the payment into court of the amount of tax admitted to be legal and due. (e.s.)

This continues to be the state law in Florida. Millstream Corporation v. Dade County, 340 So.2d 1276 (Fla. 3 DCA 1977); Blake v. R.M.S. Holding Corp., 341 So.2d 795 (Fla. 1 DCA 1977).

Petitioner alleges that the challenged assessment was excessive. This necessarily means that there was some tax that was admittedly legal and due and which should have been paid prior to initiating the challenge in state court.

Finally, the Florida Department of Revenue, represented by the Florida Attorney General, has consistently maintained in all proceedings that Florida does in fact provide a "plain, speedy and efficient remedy" under 28 U.S.C. 1341, a fact judicially upheld in Carson v. City of Ft. Lauderdale, 293 F.2d 337 (5th Cir. 1961). Said Respondent has also consistently maintained that it is incumbent on the taxpayer to timely and properly invoke such state procedures,

a position which has also been judicially upheld. Henry v. Metropolitan Dade County, 329 F.2d 780 (5th Cir. 1964).

Petitioner's groundless and unprofessional assertions regarding the ethics of the Florida Attorney General's Office are refuted by the decisions in Carson and Henry, the elemental principle that jurisdiction of a court cannot be conferred by consent of the parties and by Chief Judge Fulton's Order of dismissal where the jurisdictional prerequisites of F.S. 194.171 were addressed:

> Plaintiff's contention that the sixty day period for filing suit, provided by Fla.Stat. 194.171(2), has expired, leaving her without an adequate state remedy, is without merit. The Fifty Circuit has previously rejected this contention, stating:
>
> > The expiration of time in which the state suit might have been brought does not result in the destruction of the plain and simple remedy principle specified in the Johnson Act. To hold otherwise would allow any disgruntled taxpayer to simply wait until the statute of limitations had run in the state courts and then bring suit in the federal court.
>
> Henry vs. Metropolitan Dade County, 329 F.2d 780 (5th Cir. 1964).

CONCLUSION

For the above reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT
DEPARTMENT OF REVENUE

APPENDIX

APPENDIX A

194.171 Circuit court to have original jurisdiction in tax cases.--

(1) The circuit courts have original jurisdiction at law of all matters relating to property taxation. Venue is in the county where the property is located.

(2) No action shall be brought to contest a tax assessment after 60 days from the date the assessment being contested is certified for collection under s. 193.122(2).

(3) Before a taxpayer may bring an action to contest a tax assessment, he shall pay to the collector the amount of the tax which he admits in good faith to be owing. The collector shall issue a receipt for the payment, and the taxpayer shall file the receipt with his complaint.

(4) No action to contest a tax assessment may be maintained unless all taxes on the property which the taxpayer in good faith admits to be owing, including taxes assessed in years after the action is brought, are paid before they become delinquent.

(5) Pending actions to contest tax assessments shall be dismissed unless the taxpayer shall have paid to the collector all taxes on the property which he in good faith admits to be owing, including taxes assessed in years after the action is brought.

(6) The clerk of the circuit court shall, after deducting his statutory fee, pay to the collector all taxes which have been admitted to be due and have been deposited in the registry of the court in connection with pending actions to contest tax assessments.

APPENDIX B

UNITED STATE DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

VIRGINIA W. LUCOM,

Plaintiff,

vs.

DAVID L. REID, etc., et al.,

Defendants.

NO. WPB-75-84-Civ-CF

ORDER

This cause came before the Court upon motions to dismiss filed by all defendants.

BACKGROUND

The plaintiff, a citizen of Maryland, owns approximately 545 acres of land situated in Palm Beach County, Florida. In 1973, the property was assessed at approximately $490,000.00, resulting in a property tax of some $13,000.00. In 1974, the property was reassessed at $10,993,400.00, resulting in a tax of $263,353.73. The increase in assessed taxes from 1973 to 1974 is thus some $250,000.00.

The plaintiff has brought this action under the civil rights statutes, alleging in five counts as follows: Count One, a conspiracy to defraud plaintiff by a grossly discriminatory assessment in violation of 42 U.S.C. §1985; Count Two, a conspiracy to effect a partial taking of plaintiff's property without compensation by arbitrarily classifying it as a park, in violation of 42 U.S.C. §1985; Count Three, that the comspiracy of the second count is joined by the conspiracy of the first count in common illegal objectives in violation of 42 U.S.C. §1985; Count Four, that defendant Reid, property appraiser of Palm Beach County, refuses to prevent further damages to plaintiff by issuing a Certificate of Correction in violation of 42 U.S.C. §1986; and Count Five, that the assessments are void as in violation of the federal constitutional guarantee of equal protection under the law. As relief, the plaintiff seeks to enjoin the tax sale of the property, the award of damages, declaratory relief and further injunctive relief.

THE APPLICABILITY OF 28 U.S.C. §1341, THE TAX INJUNCTION ACT

The defendants argue vigorously that the Tax Injunction Act of 1937, 28 U.S.C. §1341, bars the prosecution of this lawsuit in federal court. The plaintiff contends, equally strenuously, that this action is not primarily a suit

for tax injunction, but is rather a civil rights action seeking damages for an alleged conspiracy in violation of plaintiff's federal constitutional rights.

The Tax Injunction Act, 28 U.S.C. §1341, provides as follows:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The inquiry as to the applicability of the above statute is two-pronged: the first question is whether the suit is one to "enjoin, suspend or restrain the assessment, levy or collection" of a state tax; and the second question, if the first is answered in the affirmative, is whether there is a "plain, speedy and efficient remedy" in the state courts. Title 28 U.S.C. §1341 is a jurisdictional bar to the maintenance in federal courts of actions which come within its meaning; thus, if applicable, it will bar the prosecution of the instant suit and the defendants' motions to dismiss must be granted. Hargrave v. McKinney, 413 F.2d 320 (5th Cir. 1969).

In ascertaining whether this suit is one to "enjoin, suspend or restrain the assessment, levy of collection" of a state tax, it is appropriate to examine

the complaint to determine the essential nature of the claim. Beard v. Stephens, 377 F.2d 685 (5th Cir. 1967). It is clear that the mere allegation that the primary nature of a claim is a civil rights suit rather than a tax injunction suit will not prevent 28 U.S.C. §1341 from divesting the Court of jurisdiction. Hickmann v. Wujick, 488 F.2d 875 (2d Cir. 1973); Bland v. McHann, 463 F.2d 21 (5th Cir. 1972); Bussie v. Long, 383 F.2d 766 (5th Cir. 1967); Kimmey v. H.A. Berkheimer, 376 F.Supp. 49 (E.D. Pa. 1974); Evangelical Catholic Communion, Inc. v. Thomas, 373 F.Supp. 1342 (D. Ver. 1973).

The Bland v. McHann case, supra, involved a suit brought under the civil rights statutes by Negroes who claimed that the assessed valuation of their properties had been discriminatorily increased in retaliation for peaceful protests against alleged racial discrimination. In holding that 28 U.S.C. §1341 barred prosecution of the action in federal court, the Fifth Circuit stated:

> It is well established that §1341 is an explicit congressional limitation on the jurisdiction of the federal courts in cases which would enjoin, suspend or restrain state tax levy, assessment or collection. Taxpayers seek to circumvent §1341 by arguing that relief under

> §1983 is supplemental and is not limited to any requirement of exhaustion of state remedies. We do not disagree with the general rule that exhaustion is not required in §1983 cases; however, in this case §1983 collides full force with a specific congressional limitation on federal jurisdiction. In such circumstances we are convinced that §1341 must prevail.

Bland v. McHann, supra, p. 24. The Court went on to note that, where the state offers a plain, adequate and complete remedy, it is the duty of the federal court to remit the taxpayers to state court. Id, p. 26.

In the case of Kimmey v. Berkheimer, 376 F.Supp 49 (E.D. Pa. 1974), plaintiffs brought suit under the civil rights statutes, challenging the constitutionality of certain sections of the state tax law which authorized local tax collectors to distrain personal property of delinquent taxpayers prior to a hearing or an adjudication relative to liability for the taxes. The Court, citing with approval the Bland v. McHann case, supra, held that the statutory prohibition of §1341 cannot be avoided merely by framing the complaint as a request for declaratory relief, and further stated that "where jurisdiction is circumscribed by §1341, premising the Court's power on 42 U.S.C. §1983 and its jurisdictional analogue, 28 U.S.C. §1343,

will not compel a contrary result." Kimmey v. Berkheimer, supra, p. 53.

The Bland v. McHann and Kimmey v. Berkheimer cases are closely analogous to the instant action. In both cases, as in this one, plaintiffs brought their actions under the civil rights statutes. In both cases, the Courts held that where the civil rights statutes collide with §1341, §1341 must prevail. Although the plaintiff in the instant cause contends that the thrust of her complaint is a civil rights action, it is readily apparent upon examination of the complaint that the entire controversy centers around an allegedly void tax assessment, with both injunctive and declaratory relief sought. Calling the complaint a civil rights action cannot conceal the fact that this entire action is inextricably intangled with Florida's tax law. Where that is true, federal courts are statutorily mandated by §1341 to follow a policy of positive non-intervention with the state taxation processes. The plaintiff here seeks both injunctive relief against the county tax authorities, in addition to declaratory relief; this case is essentially one to "enjoin, suspend or restrain the assessment, levy or collection" of a state tax. Clearly, the reasoning of the Bland v. McHann and Kimmey v. Berkheimer cases is applicable to this lawsuit, and the first requirement of the two-pronged §1341 test has been met.

It should be noted that, while the plaintiff seeks to avoid the §1341 jurisdictional bar by contending that §1341 cannot be a bar to an action seeking money damages, plaintiff's position is untenable. In the case of Evangelical Catholic Communion, Inc. v. Thomas, 373 F.Supp. 1342 (D. Ver. 1973), the Court in a well-reasoned opinion disposed of the identical issue by stating:

> Finally, the plaintiffs seek additional damages totaling $150,000.00. It is elementary that constitutional rights must be found to have been abridged in order for damages to be recovered in a civil rights action. Thus the plaintiffs in this action cannot recover damages without a determination by this court that the taxation of their Newbury property was effected in violation of their constitutional rights. If we were to make such a determination, we would, in effect, be issuing a declaratory judgment regarding the constitutionality of the tax levied on the plaintiffs. As the court is prohibited from issuing such a declaratory judgment, as indicated earlier, the court is also precluded as a matter of law from adjudicating the plaintiffs' damages claims.

Evangelical Catholic Communion, Inc. v. Thomas, supra, p. 1344. This reasoning is dispositive of the question of whether a prayer for damages will avoid the §1341 jurisdictional bar otherwise applicable to a lawsuit.

Having answered the first inquiry in the affirmative, the final §1341 question becomes whether there is a plain, speedy and efficient remedy in the state courts. This inquiry must likewise be answered affirmatively.

Chapter 194 of the Florida Statutes provides for "Administrative and Judicial Review of Property Taxes." Section 194.011 provides that notice of an assessment increase shall be given to each person subjected to the tax, and provides that anyone objecting to the assessment may file a petition opposing the assessment. Section 194.015 provides for a board of tax adjustment, and section 194.032 provides for the procedure to be followed by the board in hearing complaints. Section 194.042 provides for further administrative challenge to the assessment. Section 194.171 gives to the state Circuit Courts original jurisdiction of all matters at law pertaining to property taxation. Section 194.211 provides that an injunction may issue to restrain the sale of real property for any tax which appears to be contrary to law or equity. Clearly, Florida law provides for a plain, speedy and efficient remedy which can be had in state courts. Indeed, the Fifth Circuit has

previously held that Florida provides a "plain, speedy and efficient remedy" within meaning of §1341. Carson v. City of Ft. Lauderdale, 293 F.2d 337 (5th Cir. 1961).

Plaintiff's contention that the sixty day period for filing suit, provided by Fla. Stat. 194.171(2), has expired, leaving her without an adequate state remedy, is without merit. The Fifth Circuit has previously rejected this contention, stating:

> The expiration of time in which the state suit might have been brought does not result in the destruction of the plain and simple remedy principle specified in the Johnson Act. To hold otherwise would allow any disgruntled taxpayer to simply wait until the statute of limitations had run in the state courts and then bring suit in the federal court.

Henry v. Metropolitan Dade County, 329 F.2d 780 (5th Cir. 1964).

CONCLUSION

From the foregoing discussion, it is clear that this is a suit to "enjoin, suspend or restrain the assessment, levy or collection" of a state tax and that a "plain, speedy and efficient remedy"

may be had in the state courts. Pursuant to 28 U.S.C. §1341, this Court is therefore divested of jurisdiction. It is thereupon

ORDERED and ADJUDGED that the defendants' motions to dismiss are granted.

DONE and ORDERED at West Palm Beach, Florida this 23 day of July, 1975.

s/ Charles B. Fulton
Chief Judge

cc: Paul J. Foley, Esq.
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CERTIFICATE OF SERVICE

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